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INTERNATIONAL LAW ASSOCIATION´S DRAFT CONVENTION ON THE SETTLEMENT OF DISPUTES RELATED TO SPACE ACTIVITIES

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Arbitration is a favored method of dispute resolution in the space sector for the very same reasons as in so many other fields today. An important tentative but comprehensive step for consolidating the role of arbitration in the space sector has been made by the International Law Association (ILA). The ILA had discussed dispute resolution in the space sector since late 1970s, as a result of which it adopted in 1984 a text entitled "ILA Draft Convention on the Settlement of Space Law Disputes".[1]

In the 1990s, space activities in general intensified and the role of commercial entities in the space sector took a particularly significant step forward. The ILA considered the ensuing increased risk of disagreement as necessitating improved regulation for dispute resolution.[2] Accordingly, the Draft Convention was revised in 1998, although only minor adjustments were made to the original text. These adjustments include the change in wording of the title of the instrument, "Final Draft of the Revised Convention on the Settlement of Disputes related to Space Activities"[3] (ILA Draft Convention), apparently to allow wider coverage as space-related disputes may well extend beyond questions concerning "space law" in the sense of public international law only.[4] Among the more substantial modifications were procedural simplifications such as a reduction in the number of judges of the envisioned space law tribunal and shorter time limits in the dispute settlement procedure.[5]

The ILA Draft Convention has been described as "the first significant, organized effort to tailor an arbitration for an aerospace dispute".[6] It draws heavily on the 1982 United Nations Convention on the Law of the Sea[7] (UNCLOS) dispute resolution system. In a very similar manner to the UNCLOS (Art. 287 specifically), the ILA Draft Convention offers a variety of dispute resolution procedures – both binding and non-binding – for the parties to resort to but, eventually, provides for compulsory third-party dispute settlement. In the end, arbitration is the preferred subsidiary method of dispute resolution.[8]

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[1] Report of the 61st Conference of the ILA 1984, pp. 334-355.
[2] See Report of the 68th Conference of the ILA 1998, p. 241.
[3] Ibid., pp. 249-267.
[4] See Böckstiegel, Karl-Heinz. Presentation published in Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court. Increasing the Effectiveness of the International Court of Justice. Connie Peck – Roy S. Lee (eds.) Legal Aspects of International Organization, Vol. 29. Martinus Nijhoff Publishers: The Hague, Boston, London, 1997, pp. 446-451.
[5] Supra note 2, p. 244.
[6] Bennett, Carson W. Houston: We Have an Arbitration: International Arbitration´s Role in Resolving Commercial Aerospace Disputes. Pepperdine Dispute Resolution Law Journal, Vol 19, Iss.1, Art. 2 (2019), pp. 1-80. P. 72
[7] 1833 UNTS 397.
[8] The conflict resolution systems of the two conventions also differ from each other. For instance, the ILA Draft Convention gives no possibility to opt out of compulsory dispute settlement procedures even in the politically most sensitive issues - unlike UNCLOS (Arts. 297-298) in disputes concerning sea boundary limitations and military activities, for instance.

General Characteristics of the ILA Draft Convention

An essential element of the ILA Draft Convention is its wide scope. It places a considerable emphasis on the possibilities of private entities to utilize the dispute settlement mechanisms on a footing as equal as possible with state stakeholders. All dispute settlement procedures envisaged by the ILA Draft Convention are open not only to states and intergovernmental organizations parties to the Convention but also "to entities other than High Contracting Parties", with the exception of the International Court of Justice" (Art. 10.2) – a limitation that derives from the Statute of the ICJ itself[9]. These "other entities" are, above all, private enterprises for whom the possibility of binding resolution of disputes by arbitration tends to be of particular importance. Moreover, they are allowed direct access even to the (proposed) International Tribunal of Space Law. This represented (and still represents) a very liberal approach in international law: non-state actors[10] would not need to ask the state they are legally connected with to be a party to the dispute on their behalf in an international tribunal.[11]

The ILA-envisioned dispute resolution system is wide also in its scope of application: it applies to all activities *in* outer space or *with effects in* outer space, if carried out by states or intergovernmental organizations parties to the convention or nationals of contracting states or from the territory of such states (Arts. 1.1, 69). This includes also activities conducted on Earth if they have "effects" in outer space. Given that nearly any kind of consequence of an activity can qualify as an "effect", a formulation as wide as this is more than likely to generate problems of interpretation.

Another essential characteristic of the ILA Draft Convention is freedom of choice. It is designed as a tool for all stakeholders to utilize – if they so wish. The Draft Convention is a secondary instrument in the sense that it does "not apply to disputes where the parties have agreed or may agree to submit to another procedure of peaceful settlement, if that agreement provides for a procedure entailing binding decisions" (Art. 1.5). There is also an exclusion clause (Art. 1.2) according to which any contracting party may (on depositing its instrument of ratification) declare that it excludes from the applicability of the Convention or limits its applicability to certain types of space activities. Applicability of the Convention can also be limited to "specific areas of space law as may be dealt with in specific bilateral or multilateral treaties" (Art. 1.2.b). Furthermore, a party can declare not to be bound "by certain sections or articles" of the Convention (Art. 1.2.c). Such exclusions allow more states to become parties to the instrument, but at the cost of reducing its the effectiveness to some extent.

Methods of Dispute Resolution: Non-Binding

Pursuant to the ILA Draft Convention, the first steps in resolving disputes are the non-binding procedures under Section II. These include an "Obligation to Exchange Views" (Art. 3) and conciliation (Art. 4). The "exchange of views" (which could be termed consultations) is the first means to be used in the process of resolving a conflict, and the disputing parties are required to do this "expeditiously".[12] However, the parties may have differing opinions on whether such consultations are really needed and what does

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[9] Pursuant to Art. 34.1 of the Statute of the ICJ (being part of the Charter of the United Nations, 1 UNTS XVI): "Only states may be parties in cases before the Court".

[10] Including private entities as well as non-governmental organizations.

[11] This has been described as a "true example of progressive development of law". Dr. Stephan Hobe, according to supra note 2, p. 242. However, the same progressiveness has also been identified as being too progressive in practice – and the reason why the ILA Draft Convention has not been able to "build up a true momentum". Hulsroj P. Space Community, Space Law, Law. Proceedings of Third ECSL Colloquium on International Organizations and Space Law, ESA SP-442 (1999) pp. 69-75. P. 71.

[12] The ILA Draft Convention puts forward an obligation to resort to the same method (again, "expeditiously") when an attempt to settle a dispute has already been made but failed. Additionally, "exchange of views" is required if the practical implementation of a settlement reached requires consultation.

"expeditiously" in fact mean.[13] Even if the "exchange of views" is properly and expeditiously conducted, no obligation to take into account the outcome of the consultations in any particular manner exists.

If the "exchange of views" does not result in an agreement, either one of the parties has the option of inviting the other one to submit the dispute to conciliation (Art. 4.1). If the invitation to conciliation is not accepted or if the parties are not able to come to an agreement concerning the conciliation procedure to be applied (Art. 4.2), the conciliation proceedings "shall be deemed to be terminated" (Art. 4.3). If the parties decide to submit the dispute to conciliation, they are free to resort to any conciliation procedure they prefer, including but not limited to the procedure established by Section IV of the Draft Convention.[14]

Methods of Dispute Resolution: Binding

In case the non-binding dispute settlement methods fail to resolve a conflict, either party can trigger binding dispute resolution mechanisms of the ILA Draft Convention (Art. 5). These include the ICJ and an arbitral tribunal constituted in accordance with Section V (Art. 6). Moreover, the Draft Convention envisions the possibility of a new International Tribunal for Space Law[15]. All the courts and tribunals referred to in the ILA Draft Convention have jurisdiction over any dispute concerning a matter to which the Draft Convention is applicable and which is submitted to the court or tribunal in accordance with the Draft Convention (Art. 7.1). Their jurisdiction also extends to disputes "concerning the interpretation or application of an international agreement related to the purposes of this Convention" (Art. 7.2).

Pursuant to the ILA Draft Convention, state parties can choose by a written declaration one or more of the binding methods of dispute resolution (Art. 6). If the disputing parties have accepted in their declarations the same method, that is the only procedure to which the dispute can be submitted (unless the parties otherwise agree) (Art. 6.3). In case the declarations choose different methods, the dispute may only be submitted to arbitration in accordance with Section V (Art. 6.4).

The ILA Draft Convention sets forth detailed procedures for the space law tribunal (Section VI) and the arbitral tribunal (Section V). As no space law tribunal has been established yet and arbitration is the preferred subsidiary method, we will now focus on the latter.

The arbitration procedures under Section V are available only if the dispute has not been submitted to another arbitration procedure which entails binding decisions (Art. 24.2). If no such submission has been made, any party to the dispute can initiate arbitration under Section V. Section V puts forward a list of arbitrators which is to be established and maintained by the UN Secretary-General. Each contracting party can nominate to the list four arbitrators at most, "each of whom shall be a person experienced in space law or space affairs and having the highest reputation of fairness, competence and integrity" (Art. 25.1-2).

An arbitral tribunal normally has five members who should "preferably" be selected from the UN Secretary-General´s list (Art. 26(b)-(d)). The party which institutes the proceedings first appoints one arbitrator (included in the notification concerning the institution of proceedings), after which the other party has a 30-day time limit for appointing another arbitrator (Art. 26(c)). No limitations concerning the nationality of these arbitrators exist.

The remaining three arbitrators are "appointed by agreement between the parties" but they are not allowed to be nationals of the disputing parties (unless explicitly otherwise agreed). The disputing parties choose the president of the arbitral tribunal among these three (usually) foreign arbitrators (Art. 26(d)). Interestingly, the chair of the arbitral tribunal is thus nominated directly by the parties themselves. Furthermore, the selection of even as many as three members of the tribunal is left for the disputing parties to make together. Given that their relationship is

[13] *See supra note 2, p. 246.*

[14] *For detailed examination of the conciliation procedure established by Section IV of the ILA Draft Convention, see Viikari, Lotta. Dispute Resolution in the Space Sector: Present Status and Future Prospects. Lapland University Press, Rovaniemi. 2008. Pp.123-128.*

[15] *This forum is analogous to the permanent International Tribunal for the Law of the Sea which was established in 1996 pursuant to the UNCLOS.*

already strained by the dispute at issue, making such appointments together may not be easy.

The ILA Draft Convention (Art. 26) is prepared for difficulties which may be encountered during the process. If the party receiving the notification for the institution of proceedings does not appoint (the "second") arbitrator within the 30-day time limit or if the parties fail to select the three remaining arbitrators together within 60 days of the receipt of the notification, the remaining arbitrators can be selected by "a person or a third state chosen by the parties". If the parties are not able to agree even about this person or third state, the appointment of the missing arbitrator(s) can be made by the President of the International Tribunal for Space Law (or if this tribunal has not been created yet, by the President of the ICJ).

Once established, the arbitral tribunal determines its own procedure (unless the disputing parties agree otherwise), on the condition that it must give each party "a full opportunity to be heard and to present its case" (Art. 28). The disputing parties are under an obligation to "facilitate the work" of the tribunal by, e.g., providing it with "relevant documents, facilities and information" (Art. 29(a)). On the other hand, the non-attendance of a disputing party to the proceedings does not prevent the tribunal from making an award, provided that it has jurisdiction over the dispute and is satisfied that the claim is "well founded in fact and law" (Art. 32).

The arbitral tribunal takes its decisions by a majority vote. It has a quorum if at least half of its members are present and voting. In case of a tie, the president has a decisive vote. (Art. 31) The award must be "confined to the subject-matter of the dispute and state the reasons on which it is based". Any member of the tribunal can attach to the award a separate or dissenting opinion. (Art. 33) The award can be appealed only if the disputing parties have in advance agreed to an appellate procedure; otherwise, it is final and binding. (Art. 34) The parties can nevertheless ask for an additional decision concerning the interpretation or implementation of the award (Art. 35). The disputing parties bear the expenses of the tribunal "in equal shares" (unless the tribunal decides otherwise) (Art. 30).

Need for a New Revision?

A lot has happened in the space sector since the adoption of the ILA Draft Convention. States never signed or ratified the instrument. Despite its liberal approach to the private sector, the Draft Convention has been criticized, i.a., for providing insufficient "accessibility and standing" for small commercial enterprises, let alone private individuals engaged in space activities[16]. Although the Draft Convention aims at equality, it still relies to some extent on the traditional setting of international law where state actors enjoy a dominant position. Even placing state and non-state actors on the same platform may not be equal in terms of resources. This no doubt is likely to lead to increasing controversies, given the rapidly developing small-satellite industry, for instance.

Another potentially problematic element is the focus on legal resolution of disputes. In the space sector, all activities necessitate complex technologies and thereby much more than legal expertise only. Accordingly, many of the disputes that arise also necessitate knowledge beyond the law. Although the ILA Draft Convention gives the court or tribunal involved the possibility of appointing two or more "scientific or technical experts" to sit with it in case of disputes "involving scientific or technical matters" (Art. 8), this remains optional. Moreover, the experts only serve as advisers: they have no voting rights in decision-making.[17]

Given the extensive scope of the ILA Draft Convention, its wide acceptance would be necessary. This means not only the actual space faring nations but more or less all states whose activities (including those conducted on the Earth) may entail "effects" in outer space. On the other hand, it is precisely the far-reaching scope of the instrument that is likely to discourage states from adhering to it. However, instead of developing the Draft Convention further, the ILA has recently focused on the (lack of) effectiveness of the PCA Optional Rules on Arbitration of Disputes relating to outer space activities.[18]

[16] *Goh, Gérardine Meishan. Dispute Settlement in International Space Law: A Multi-Door Courthouse for Outer Space. Studies in Space Law: Vol. 2. Martinus Nijhoff Publishers: Leiden/Boston, 2007. P. 69.*

[17] *See also ibid.*

[18] *See, e.g., ILA Sydney Conference Report (2018) Space Law Committee, p. 4; ILA Johannesburg Conference Report (2016) Space Law Committee, pp. 3-4. Both available at https://www.ila-hq.org/index.php/committees [28.1.2021].*